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Supreme Court, U.S.
FILED
AUG 11 1995
OFFICE OF THE CLERK

No. 94-2014

In the Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL D. JONES, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' tort claims against the Resolution Trust Corporation, based on a failed savings association's alleged oral agreements to modify written loan contracts, were properly dismissed as barred by the *D'Oench* doctrine and by 12 U.S.C. 1823(e).

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-31) is reported at 43 F.3d 587. The vacated panel opinion (Pet. App. 32-71) is reported at 7 F.3d 1006. The opinion of the district court (Pet. App. 72-84) is unreported.

JURISDICTION

The judgment of the court of appeals following rehearing en banc was entered on January 26, 1995. A petition for rehearing was denied on March 13, 1995. Pet. App. 85-87. The petition for a writ of certiorari

was filed on June 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose from a banking relationship between petitioners, Michael D. Jones, Robert A. Guskiewicz, R.S. Futch, Jr., and Lake Pickett, Ltd., and Freedom Savings and Loan Association (New Freedom), a federal savings and loan institution.[1] At the time of the incidents alleged in this litigation, petitioners owed New Freedom, in the aggregate, more than $8,000,000 on two loan obligations, secured by mortgages on real property. Each of the loans was evidenced by a standard note (the Notes), and although both Notes had matured, neither had been repaid. Pet. App. 3-4.

Petitioner contacted prospective purchasers of the properties securing the loans, and offered to sell them the properties in exchange for assuming the obligations under the Notes. Under the written terms of the loan documents, however, the loan obligations could not be assumed without New Freedom's prior consent. Pet. App. 4-5. Petitioners contend that between February and May, 1988, over the course of several meetings, New Freedom employees agreed orally that New Freedom would permit assumption of the loans by the purchasers, lend additional funds, and extend the time for repayment. *Id.* at 4-5, 39. New Freedom's board of directors did not approve

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[1] On July 23, 1987, the Federal Home Loan Bank Board (FHLBB) declared Freedom Savings and Loan Association insolvent. Its assets (including the loans at issue in this case) were transferred to a new federal savings and loan association with the same name, which the court of appeals referred to as "New Freedom." Pet. App. 4. We adopt the same convention.

petitioners' proposals on either loan, however, and when the negotiations broke down, petitioners brought suit in state court against New Freedom and various of its officers, claiming that New Freedom tortiously made false oral assurances regarding the loans. New Freedom counterclaimed to foreclose on one of petitioners' properties, and instituted separate foreclosure proceedings on the other property. Petitioners asserted counterclaims in the foreclosure proceedings that mirrored the claims they had raised in their initial action. *Id.* at 5, 74. Through their claims and counterclaims, petitioners sought to prevent New Freedom from enforcing the Notes, or to obtain an affirmative monetary recovery against New Freedom to set off their loan obligations.

2. On February 7, 1989, the FHLBB declared New Freedom insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator. Pet. App. 5. On March 8, 1989, the FSLIC removed the cases to the United States District Court for the Middle District of Florida, where they were consolidated. *Ibid.* Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (FIRREA), the Resolution Trust Corporation (RTC) has since replaced the FSLIC. The RTC, as receiver, retains the liabilities of New Freedom, and occupies New Freedom's place with respect to petitioners' claims against the failed institution. The RTC, in its corporate capacity, acquired New Freedom's assets and thereby succeeded to New Freedom's claims against petitioners. Pet. App. 5-6.

3. On June 8, 1990, the district court granted summary judgment for the RTC, holding petitioners' claims and defenses barred by the doctrine enunciated

by this Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. 1823(e) (Supp. V 1993).[2] Pet. App. 72-84. The court held that "[w]hen a federal banking authority seeks to collect on a note acquired by it in the course of a regulatory takeover or a purchase and assumption transaction, the *D'Oench* doctrine insulates the banking authority from defenses and claims which are based on agreements or representations not evident on the face of the note because such 'secret' agreements or representations could mislead the banking authority as to the true value of the assets of the failed bank." *Id.* at 76.

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[2] Section 1823(e) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

Pursuant to 12 U.S.C. 1441a(b)(4) (Supp. V 1993), the protection afforded the Federal Deposit Insurance Corporation (FDIC) under Section 1823(e) extends equally to the RTC.

4. The court of appeals affirmed the district court's judgment in part, and reversed it in part. Pet. App. 32-71. The only issue that petitioners raised, briefed, and argued on appeal was whether the alleged actions of New Freedom employees with respect to the loans should be attributed to the RTC, and whether the RTC should therefore be equitably estopped from asserting the bar of *D'Oench* and Section 1823(e). Gov't C.A. Br. 46 & n.72 (en banc); Pet. App. 70-71 n.7. The court rejected that claim, as foreclosed by 12 U.S.C. 1821(n)(6)(A) (Supp. V 1993). Pet. App. 57-59.[3] It reversed the district court's dismissal of petitioners' primary tort claims against the RTC as receiver, however, holding that those claims were "free-standing" tort claims, and as such were not subject to the *D'Oench* bar or to the requirements of Section 1823(e). Pet. App. 48-53.[4]

Judge Anderson dissented from that part of the court's ruling that reversed the judgment of the district court. Pet. App. 60-71. In his view, the tort claims alleged by petitioners were "sufficiently intertwined with oral representations made during ordinary banking transactions to be barred by *D'Oench*." *Id.* at 70.

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[3] The argument had previously been rejected by the district court, Pet. App. 78-79, and was later found by the en banc court of appeals to be wholly without merit, *id.* at 6 & n.1. Petitioners have not challenged that determination.

[4] The court of appeals affirmed the district court's ruling that petitioners' prayer for a declaration that their loan obligations were excused by the tortious conduct of New Freedom was barred by *D'Oench*, Pet. App. 34 n.1, and affirmed the district court's dismissal of petitioners' remaining claims against the RTC, in its corporate capacity, on other grounds, *id.* at 53-59.

5. The Eleventh Circuit granted the RTC's petition for rehearing en banc, vacated the panel opinion, and, after briefing and argument, affirmed the judgment of the district court. Pet. App. 1-31. Proceeding from the principle that *D'Oench* and Section 1823(e) bar tort claims based on oral agreements that arise in the course of regular banking transactions, Pet. App. 12-13, the court concluded that petitioners' claims, based on alleged oral assurances regarding changes to written loan agreements, were "precluded by the logic of [*Langley* v. *FDIC*, 484 U.S. 86 (1987)] and the theoretical underpinnings of *D'Oench* itself," Pet. App. 24-25. The court rejected petitioners' suggestion that it distinguish between claims asserted as defenses to payment and claims made in the nature of set-off, recognizing that "otherwise, an obligor could accomplish indirectly what *D'Oench* expressly prohibits, enforcement of an unwritten agreement." *Id.* at 21.[5]

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[5] On rehearing, petitioners argued for the first time that *D'Oench* and Section 1823(e) should not apply to their "free-standing" claims that New Freedom (i) wrongfully disclosed confidential information about their loans; (ii) intentionally interfered with their business relations; and (iii) breached its fiduciary duties. Pet. App. 7 n.2, 25. The court held that because those claims were not fairly presented to the district court in response to the RTC's motion for summary judgment, they were "deemed abandoned." *Id.* at 26-27. On that ground, the court declined to determine whether the claims were sufficiently independent of the Notes or the restructuring negotiations to escape the *D'Oench* bar. Pet. App. 25-26. Petitioners' failure to raise in the district court their claims of wrongful disclosure, intentional interference, and breach of fiduciary duty similarly preclude them from raising those claims in this Court. See *Ellis* v. *Dixon*, 349 U.S. 458 (1955)

ARGUMENT

The *D'Oench* doctrine and Section 1823(e) require that agreements reached in the context of regular banking transactions be documented in writing, approved by the financial institution's board of directors or loan committee, and recorded properly in the books and records of the financial institution if they are to be enforceable against the FDIC or RTC. See, *e.g.*, *FDIC* v. *Longley I Realty Trust*, 988 F.2d 270, 274 (1st Cir. 1993) (Section 1823(e) precludes appellants from binding FDIC to alleged settlement); *FDIC* v. *Hadid*, 947 F.2d 1153, 1157 (4th Cir. 1991) (applying *D'Oench* to bar arguments related to oral agreement allegedly made in course of loan restructuring). In *Langley*, this Court made clear that Section 1823(e) applies to bar a defense of fraud based on an alleged oral misrepresentation just as it would apply to bar an attempt to enforce that representation as an agreement against the FDIC. 484 U.S. at 96.[6]

(issue not raised at trial is waived for purposes of certiorari review).

[6] The courts of appeals that have ruled on the issue since *Langley* have uniformly applied the *D'Oench* doctrine, as the Court applied Section 1823(e), to bar tort claims arising from unrecorded agreements. See *Inn at Saratoga Assocs.* v. *FDIC*, No. 94-6205 (2d Cir. July 10, 1995), slip op. 5507 ("So long as the tort claims arise out of the secret agreement alleged, the common law doctrine applies * * *. Furthermore, the fact that plaintiffs assert the alleged agreement in support of their affirmative claim, rather than as a defense to an FDIC action, does not protect it from *D'Oench, Duhme* scrutiny."); *Castleglen, Inc.* v. *RTC*, 984 F.2d 1571, 1577 (10th Cir. 1993) (holding that fraud and misrepresentation claims were barred by *D'Oench* because "[i]f the *D'Oench* doctrine is to have any

The court of appeals correctly applied the *D'Oench* doctrine and Section 1823(e) to bar petitioners' claims against the RTC, which are based entirely on alleged oral agreements with a failed savings association. Unrecorded arrangements, such as those alleged by petitioners, purporting to alter the written terms of the Notes, are not enforceable under *D'Oench* and Section 1823(e), because such arrangements may affect the value of a bank's assets, and thereby mislead bank examiners. *Langley*, 484 U.S. at 91; *D'Oench*, 315 U.S. at 459-461. Requiring that such arrangements be documented and properly approved also serves to "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Langley*, 484 U.S. at 92. It is undisputed in this case that there is no written

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force, courts cannot permit debtors to evade its prohibitions simply by recasting their contract defenses as affirmative tort claims"); *Oliver* v. *RTC*, 955 F.2d 583, 586 (8th Cir. 1992) (rejecting appellants' contention that "the *D'Oench* doctrine does not preclude their claim for breach of fiduciary duty because it is a tort claim rather than a contract claim," and stating that "to the extent the * * * breach of fiduciary duty claim is based on the asserted side agreements, the claim is barred by the *D'Oench* doctrine"); *FDIC* v. *Payne*, 973 F.2d 403, 406 (5th Cir. 1992) (holding defense of fraudulent inducement barred); *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 50 (1st Cir. 1991) (holding that "*D'Oench* bars defenses and affirmative claims whether cloaked in terms of contract or tort, as long as those claims arise out of an alleged secret agreement," and explaining that "[t]o allow the plaintiff to assert tort claims based on the oral agreement would circumvent the very policy behind *D'Oench*, and therefore, *D'Oench* is generally said to apply to tort claims").

record of New Freedom's alleged oral agreements regarding petitioners' loan obligations, and "clear that the appropriate bank officials did not authorize assumption of [petitioners'] mortgage indebtedness." Pet. App. 68. The court of appeals' routine application of the *D'Oench* doctrine to bar petitioners' claims was consistent with this Court's opinions in *D'Oench* and *Langley*, and consonant with the approaches taken by other courts of appeals.

1. Petitioners argue (Pet. 15-18) that the court of appeals erred in applying *D'Oench* and Section 1823(e), because (they contend) their claims alleged "independent" torts, which do not fall within the scope of the doctrinal or statutory bar. They assert that the *D'Oench* doctrine has no more application to their claims than to tort claims "for personal injuries to a motorist in a collision with an armored car bringing money to the S. & L. office, or for insider profits in a sale of securities violating Securities and Exchange regulations." Pet. 16 (quoting *Astrup* v. *Midwest Fed. Sav. Bank*, 886 F.2d 1057, 1059-1060 (8th Cir. 1989)).

This case, however, does not implicate any "independent" tort exception to the *D'Oench* doctrine. The court of appeals' ruling was not, as petitioners contend (Pet. 18), based on the mere fact that the torts alleged "had something to do with * * * a 'regular banking transaction.'" Petitioners' claims are premised on New Freedom's breach of alleged oral understandings "that additional monies could be loaned, that extensions could be granted, and that [New Freedom] would permit assumption of the mortgage by a qualified buyer." Pet. App. 12. Claims based on oral understandings regarding an institution's extension of credit lie at the heart of the

D'Oench doctrine. Where, as here, a party asserts against the RTC claims based on an institution's alleged agreements respecting an extension of credit, and the alleged agreements have not been documented in writing, approved by the institution's board of directors or loan committee, or reflected in the institution's loan records, the claims are correctly barred. See *Langley*, 484 U.S. at 96.[7]

Petitioners' argument (Pet. 17) that "a nefarious scheme to interfere with the borrowers' sale of the properties * * * is not the kind of thing [bank officers] would reduce to a written agreement or document in the minutes of its Board of Directors" misses the point. No "agreement" to commit a tort was at issue in this case. Rather, petitioners' claims were based on alleged oral agreements to extend and allow the assumption of loans, and to advance additional funds. Agreements of that sort, "unlike [obligations] arising from an automobile accident, * * * could have, and should have, been documented in the bank's records." Pet. App. 16.[8]

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[7] That outcome is not unfair. As this Court has stated, "the borrower who has relied upon an erroneous or even fraudulent unrecorded representation" is in the best position "to protect himself by assuring that his agreement is approved and recorded in accordance with" Section 1823(e) and the *D'Oench* doctrine. *Langley*, 484 U.S. at 94; accord *D'Oench*, 315 U.S. at 461. As between the borrower and the RTC as receiver, which represents the taxpayers, as well as the failed institution's creditors and depositors, the borrower should bear the risk of failing to insist on proper documentation and approval of representations on which the borrower relies.

[8] The Eleventh Circuit distinguished between "typical claims like employment discrimination and automobile accidents which would be free-standing torts not barred by

The court of appeals therefore properly determined that petitioners' claims do not fall within a "free-standing" or "independent" tort exception to the *D'Oench* doctrine, no matter how that phrase is defined. Although *Astrup* v. *Midwest Fed. Sav. Bank*, *supra*, contained broad language that seemingly precluded the extension of *D'Oench* to tort claims, 886 F.2d at 1059, the Eighth Circuit has since described *Astrup* as holding merely that *D'Oench* does not affect tort claims that are not based upon an agreement. *Hanson* v. *FDIC*, 13 F.3d 1247, 1252 (1994). The court made clear that "actions sounding in tort but based upon unwritten or secret agreements between the parties are barred." *Ibid.*[9] See also *Oliver* v. *RTC*, 955 F.2d 583, 585-586 (8th Cir. 1992) (*D'Oench* precludes claims of breach of fiduciary duty based on unrecorded side agreements).

2. Petitioners argue (Pet. 19) that the court of appeals erred in applying the *D'Oench* doctrine and Section 1823(e) in this case because, they contend, those bars apply only to "claims and defenses directed to the validity of a specific loan asset." All of peti-

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D'Oench, and those relating to 'ordinary banking transactions,'" which would be barred. Pet. App. 15. See also *In re Geri Zahn, Inc.*, 25 F.3d 1539, 1543-1544 (11th Cir. 1994); *OPS Shipping Ctr., Inc.* v. *FDIC*, 992 F.2d 306, 310 (11th Cir. 1993) (applying the "ordinary banking transaction" test).

[9] The court in *Hanson* favorably cited *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 50 n.4 (1st Cir. 1991), *Hanson*, 13 F.3d at 1252, which expressly criticized the language in *Astrup*, concluding that "[t]o the extent that *Astrup* supports the contention that *D'Oench* does not bar affirmative claims sounding in tort, we reject it as contrary to *D'Oench*'s policy of shielding the FDIC from secret agreements." *Timberland*, 932 F.2d at 50 n.4.

tioners' claims, however, are attempts to defeat enforcement of their loan obligations, either directly or through a setoff, and to prevent the RTC from recovering the amounts due under the Notes. There is no doubt, therefore, that petitioners' claims are related to specific assets of New Freedom. But even if petitioners were correct on that point, the courts of appeals have uniformly held that a claim need not directly challenge a particular asset to be barred by *D'Oench*.[10] Otherwise, claimants would be permitted to avoid *D'Oench* through artful pleading, defeating the underlying purposes of the doctrine.

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[10] See *Brookside Assocs.* v. *Rifkin*, 49 F.3d 490, 496 (9th Cir. 1995) (holding that *D'Oench* "applies to bar suit even when the RTC does not acquire a specific asset whose value is affected by the alleged secret agreement"); *OPS*, 992 F.2d at 309 ("We can discern nothing in the purpose of the *D'Oench* doctrine which would support appellant's proposed limitation of the doctrine."); *Adams* v. *Madison Realty & Dev., Inc.*, 937 F.2d 845, 857 n.5 (3d Cir. 1991) ("[S]ection 1823(e) and the *D'Oench, Duhme* doctrine require only that the FDIC have some interest in some asset."); *Twin Constr. Inc.* v. *Boca Raton, Inc.*, 925 F.2d 378, 382 (11th Cir. 1991) ("If *any* of a bank's assets are diminished by agreements not contained in the records of the bank," *D'Oench* applies.); *Hall* v. *FDIC*, 920 F.2d 334, 339 (6th Cir. 1990) ("*D'Oench* is important for allowing banking authorities to determine exactly what a bank's assets and liabilities are. The doctrine may therefore be invoked even where FDIC does not have 'an interest in an asset.' "), cert. denied, 511 U.S. 1231 (1991); *Bowen* v. *FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990) ("The agreement need not implicate a specific obligation, such as a note or other asset held by the FDIC."); *Bell & Murphy & Assocs., Inc.* v. *Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir. 1990) (rejecting argument that *D'Oench* doctrine "bars only claims or defenses based upon unrecorded side agreements that defeat the FDIC's interest in a *specific asset* acquired from a bank").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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